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## **DEPARTMENT OF HOMELAND SECURITY**

### **8 CFR Parts 214 and 274a**

**[CIS No. 2667-20; DHS Docket No. USCIS-2020-0008]**

**RIN 1615-AC55**

### **Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** As a result of disruptions and uncertainty to the U.S. food agriculture sector during the upcoming summer agricultural season caused by the global novel Coronavirus Disease 2019 (COVID-19) public health emergency, the Department of Homeland Security, U.S. Citizenship and Immigration Services, has decided to temporarily amend the regulations regarding temporary and seasonal agricultural workers, and their U.S. employers, within the H-2A nonimmigrant classification. The Department is temporarily removing certain limitations on agricultural employers and workers in order to provide agricultural employers with an orderly and timely flow of legal foreign workers, thereby protecting the integrity of the nation's food supply chain and decreasing possible reliance on unauthorized aliens, while encouraging agricultural employers' use of the H-2A program, which protects the rights of U.S. and foreign workers. Namely, the Department will allow H-2A employers whose extension of stay H-2A petitions are supported by valid temporary labor certifications (TLCs) issued by the Department of Labor to begin work immediately after the extension of stay petition is received by USCIS. The Department is also temporarily amending its regulations to allow H-2A workers to stay in

the United States beyond the 3 years maximum allowable period of stay. DHS will apply this temporary final rule to H-2A petitions requesting an extension of stay, and, if applicable, any associated applications for an extension of stay filed by or on behalf of an H-2A worker, if they were received on or after March 1, 2020 and remain pending as of the effective date of this rule, as well as H-2A petitions for an extension of stay, received on or after the effective date of this rule, ending on the last day this rule is in effect.

**DATES:** This final rule is effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2120, Telephone Number (202)-272-8377 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

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## **I. Background**

### **A. Legal Framework**

The Secretary of Homeland Security (Secretary) has the authority to amend this regulation under section 102 of the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 112, and section 103(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1103(a), which authorize the Secretary to administer and enforce the immigration and nationality laws. Under section 101 of the HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of the Department is to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.” In addition, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), provides the Secretary with authority to prescribe the terms and conditions of any alien’s admission to the United States as a nonimmigrant. The INA further requires that “[t]he question of importing any alien as [an H-2A] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS], after consultation with appropriate agencies of the Government [the U.S. Department of Labor and the U.S. Department of Agriculture], upon petition by the importing employer.” INA 214(c)(1), 8 U.S.C. 1184(c)(1). Section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), states that “‘an unauthorized alien’ means . . . that the alien is not at that time . . . authorized to be employed by this chapter or by the [Secretary].”

## **B. Description of the H-2A Program**

The H-2A nonimmigrant classification applies to alien workers seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis, usually lasting no longer than 1 year, for which U.S. workers are not available. INA 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 CFR 214.1(a)(2). As noted in the statute, not only must the alien be coming “temporarily” to the United States, but the agricultural labor or services that the alien is performing must also be “temporary or seasonal.” INA 101(a)(15)(H)(ii)(a). The regulations further define an employer’s temporary need as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. 8 CFR 214.2(h)(5)(iv)(A). An employer’s seasonal need is defined as employment that is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels above those necessary for ongoing operations. *Id.*

An employer, agent, or association (“H-2A petitioner”) must submit a petition to U.S. Citizenship and Immigration Services (USCIS) to obtain authorization of temporary workers as H-2A nonimmigrants before the employer may begin employing H-2A workers. INA 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(2)(i). DHS must approve this petition before the alien can be considered eligible for H-2A status or a visa. To qualify for H-2A classification, the H-2A petitioner must, among other things, offer a job that is of a temporary or seasonal nature, and must submit a single, valid temporary labor certification (TLC) from the U.S. Department of Labor (DOL) establishing that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work, and that employing H-2A workers will not

adversely affect the wages and working conditions of workers in the United States similarly employed.<sup>1</sup> INA 101(a)(15)(H)(ii)(a) and 218, 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 1188; *see also generally* 8 CFR 214.2(h)(5)(i)(A) and (h)(5)(iv). Aliens who are outside of the United States also must first obtain an H-2A visa from the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad, if required, and then seek admission with U.S. Customs and Border Protection (CBP) at a U.S. port of entry prior to commencing employment as an H-2A nonimmigrant. Aliens may be admitted for an additional period of up to one week prior to the employment start date for the purpose of travel to the worksite. 8 CFR 214.2(h)(5)(viii)(B).

#### **i. DOL Temporary Labor Certification (TLC) Procedures**

Prior to filing the H-2A petition with DHS, the U.S. employer or agent must obtain a valid TLC from DOL for the job opportunity the employer seeks to fill with an H-2A worker(s). As part of the TLC process, the petitioning employer must have demonstrated to the satisfaction of the Secretary of Labor that (a) there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (b) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1); *see also* 20 CFR 655.100.

The INA specifies a number of conditions under which the Secretary cannot grant a temporary labor certification. 8 U.S.C. 1188(b). One such condition is where “[t]he Secretary determines that the employer has not made positive recruitment efforts within a multi-state

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<sup>1</sup> Under certain emergent circumstances, petitions requesting a continuation of employment with the same employer for 2 weeks or less are exempt from the TLC requirement. *See* 8 CFR 214.2(h)(5)(x).

region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” 8 U.S.C. 1188(b)(4). The “positive recruitment” that the INA requires “is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer’s job offer.” 8 U.S.C. 1188(b)(4). An employer’s obligation to engage in this recruitment terminates “on the date the H-2A workers depart for the employer’s place of employment.” *Id.* The standards and procedures governing the positive recruitment of U.S. workers are set forth in DOL’s regulations. 20 CFR 655.151 through 655.154.

To obtain a TLC from DOL, the employer must first submit an agricultural job order, within 75 to 60 calendar days prior to the start date of work, to the State Workforce Agency (SWA) that serves the state where the actual work will be performed. The SWA will then initiate the interstate recruitment of U.S. workers. In addition, the employer must submit an H-2A application to DOL’s Office of Foreign Labor Certification (OFLC) no less than 45 calendar days before the start date of work. OFLC will review the H-2A application and notify the employer of any deficiencies, as well as provide instructions for additional recruitment efforts for U.S. workers.

As noted above, in granting the TLC, DOL certifies that there are no U.S. workers who are able, willing, and qualified to fill the temporary or seasonal position and that the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. INA 214(c)(1) and 218(a), 8 U.S.C. 1184 (c)(1) and 1188(a); 8 CFR 214.2(h)(5)(ii) and (h)(5)(iv)(B); 20 CFR 655.100. The U.S. employer must comply with DOL’s regulations covering the H-2A process, including, but not limited to, offering the job

opportunity identified on the TLC to any laid-off U.S. worker(s) and contacting former U.S. workers who were employed in the job opportunity identified on the TLC. 20 CFR 655.135 and 655.153. The U.S. employer must also continue to accept referrals of all eligible U.S. workers who apply for the job opportunity until 50 percent of the work contract period certified by DOL has elapsed, as specified in 20 CFR 655.135(d).

## **ii. DHS Petition Procedures**

After receiving a valid TLC from DOL, the employer listed on the TLC, an employer's agent, or the association of United States agricultural producers named as a joint employer on the TLC ("H-2A petitioner") may file the H-2A petition with the appropriate USCIS office. INA 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(2)(i), (h)(5)(i)(A). The H-2A petitioner may petition for one or more named or unnamed H-2A workers, but the total number of workers may not exceed the number of positions indicated on the TLC. 8 CFR 214.2(h)(2)(iii) and (h)(5)(i)(B). H-2A petitioners must name the H-2A worker if the worker is in the United States or if the H-2A worker is a national of a country that is not designated as an H-2A participating country. 8 CFR 214.2(h)(2)(iii). USCIS recommends that petitioners submit a separate H-2A petition when requesting a worker(s) who is a national of a country that is not designated as an H-2A participating country. *See* 8 CFR 214.2(h)(5)(i)(F); *see also Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, Notice, 85 FR 3067 (Jan. 17, 2020). Petitioners for such aliens must submit evidence demonstrating the factors by which the request for H-2A workers serves the U.S. national interest. 8 CFR 214.2(h)(5)(i)(F)(1)(ii). USCIS will review each petition naming a national from a country not on the list and all supporting documentation and make a determination on a case-by-case basis.

A U.S. employer or U.S. agent generally may submit a new H-2A petition, with a new, valid TLC, to USCIS to request an extension of H-2A nonimmigrant status for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). The H-2A petitioner must name the worker on the Form I-129, Petition for Nonimmigrant Worker, since the H-2A worker is in the United States and requesting an extension of stay. In the event of an emergency circumstance, however, a U.S. employer may request an extension not to exceed 14 days without first having to obtain an additional approved TLC from DOL if certain criteria are met, by simply submitting the new H-2A petition. *See* 8 CFR 214.2(h)(5)(x).

In 2008, USCIS promulgated regulations allowing H-2A workers to begin work with a new petitioning employer upon the filing of an H-2A petition, before petition approval, provided that the new employer is a participant in good standing in the E-Verify program.<sup>2</sup> 8 CFR 214.2(h)(2)(i)(D) and 8 CFR 274a.12(b)(21). In such a case, the H-2A worker's employment authorization continues for a period not to exceed 120 days beginning on the "Received Date" on the Form I-797, Notice of Action, which acknowledges the receipt of the new H-2A extension petition. With the exception of the new employer and worksite, the employment authorization extension remains subject to the same conditions and limitations indicated on the initial H-2A petition. The continued employment authorization extension will terminate automatically if the new employer fails to remain a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.

### **iii. Admission and Limitations of Stay**

Upon USCIS approval of the H-2A petition, the U.S. employer or agent may hire the H-2A workers to fill the job opening. USCIS will generally grant the workers H-2A classification

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<sup>2</sup> *See* Changes to Requirements Affecting H-2A Nonimmigrants, 73 FR 76891, 76905 (Dec. 8, 2008).



for up to the period of time authorized on the valid TLC. H-2A workers who are outside of the United States may apply for a visa with DOS at a U.S. Embassy or Consulate abroad, if required, and seek admission to the United States with CBP at a U.S. port of entry. Spouses and children of H-2A workers may request H-4 nonimmigrant status to accompany the principal H-2A worker. The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. 8 CFR 214.2(h)(9)(iv). Thus, H-4 dependents of these H-2A workers are subject to the same limitations on stay, and permission to remain in the country during the pendency of the new employer's petition, as the H-2A beneficiary.

An alien's H-2A status is limited by the validity dates on the approved H-2A petition, which must be less than 1 year. 8 CFR 214.2(h)(5)(viii)(C). H-2A workers may be admitted into the United States for a period of up to 1 week prior to the beginning validity date listed on the approved H-2A petition so that they may travel to their worksites, but may not begin work until the beginning validity date. H-2A workers may also remain in the United States 30 days beyond the expiration date of the approved H-2A petition to prepare for departure or to seek an extension or change of nonimmigrant status. H-2A workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized. 8 CFR 214.2(h)(5)(viii)(B).

The maximum period of stay for an alien in H-2A classification is 3 years. 8 CFR 214.2(h)(5)(viii)(C). Once an alien has held H-2A nonimmigrant status for a total of 3 years, the alien must depart and remain outside of the United States for an uninterrupted period of 3 months before seeking readmission as an H-2A nonimmigrant. 8 CFR 214.2(h)(5)(viii)(C).

## C. COVID-19 National Emergency

On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to the Coronavirus Disease 2019 (COVID-19).<sup>3</sup> On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak to control the spread of the virus in the United States.<sup>4</sup> The President's proclamation declared that the emergency began on March 1, 2020. In response to the Mexican government's call to increase social distancing, DOS announced the temporary suspension of routine immigrant and nonimmigrant visa services processed at the U.S. Embassy in Mexico City and all U.S. consulates in Mexico beginning on March 18, 2020.<sup>5</sup> DOS expanded the temporary suspension of routine immigrant and nonimmigrant visa services to all U.S. Embassies and Consulates on March 20, 2020.<sup>6</sup> DOS designated H-2A visas as mission critical, however, and announced that U.S. Embassies and Consulates will continue to process H-2A cases to the extent possible and implemented a change in its procedures, to include interview waivers.<sup>7</sup> In addition, DHS has identified occupations in food and agriculture as critical to the U.S. public health and safety and economy.<sup>8</sup>

## II. Discussion

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<sup>3</sup> HHS, *Determination of Public Health Emergency*, 85 FR 7316 (Feb. 7, 2020).

<sup>4</sup> Proclamation 9994 of March 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020). See also <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited Mar. 25, 2020).

<sup>5</sup> DOS, *Status of U.S. Consular Operations in Mexico in Light of COVID-19*, <https://mx.usembassy.gov/status-of-u-s-consular-operations-in-mexico-in-light-of-covid-19/>.

<sup>6</sup> DOS, *Suspension of Routine Visa Services*, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>.

<sup>7</sup> See DOS website, *Important Announcement on H2 Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (last updated Mar. 26, 2020).

<sup>8</sup> DHS, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf> (Mar. 19, 2020).

**A. Temporary Changes to DHS Requirements for H-2A Change of Employer Requests and H-2A Maximum Period of Stay Exception during the COVID-19 National Emergency**

DHS regulations currently permit H-2A workers to continue to be employment-authorized while waiting for their extensions of H-2A status based on an H-2A petition, accompanied by an approved TLC, filed by a new employer if the new employer is in good standing in the E-Verify program. 8 CFR 274a.12(b)(21).

DHS is committed to both protecting U.S. workers and to helping U.S. businesses receive the legal and work-authorized labor for temporary or seasonal agricultural labor or services that they need. Due to travel restrictions and visa processing limitations as a result of actions taken to mitigate the spread of COVID-19, as well as the possibility that some H-2A workers may become unavailable due to COVID-19 related illness, U.S. employers who have approved H-2A petitions or who will be filing H-2A petitions might not receive all of the workers requested to fill the temporary positions, and similarly, employers that currently employ H-2A workers may lose the services of these workers due to COVID-19 related illness. In the wealth of uncertainty inherent to confronting a public health emergency of this magnitude, DHS is taking steps to ensure that the agricultural sector has greater certainty and flexibility to minimize gaps in their H-2A workflow. Therefore, for at least 120 days, the Department is providing the flexibilities discussed herein. The Department is amending its regulations to temporarily permit all H-2A employers to allow aliens who currently hold H-2A status to start working upon the receipt of the employer's new H-2A petition, but no earlier than the start date of employment listed on the H-2A petition, to meet the employer's needs during the national emergency. *See* new 8 CFR 214.2(h)(21) and 8 CFR 274a.12(b)(26). Unlike the current regulation at 8 CFR 274a.12(b)(21), which allows the H-2A worker(s) to immediately work for a new H-2A employer in good

standing in E-Verify upon the filing of an H-2A petition, this final rule temporarily allows the H-2A worker(s) to immediately work for any new H-2A employer, but no earlier than the start date of employment listed on the H-2A petition, upon the filing of a new H-2A petition during the COVID-19 National Emergency only.

The Department remains committed to promoting the use of E-Verify to ensure a legal workforce. E-Verify is free, user friendly, and over 98% accurate.<sup>9</sup> Notwithstanding the numerous benefits E-Verify offers to ensure all employers only employ a legal workforce, the Department has determined that it is necessary to temporarily amend its regulations affecting H-2A workers to mitigate the impact on the agricultural industry due to COVID-19. These H-2A petitioners will have completed a test of the U.S. labor market, and DOL will have determined that there are no qualified U.S. workers available to fill these temporary positions. The Department believes that granting H-2A workers the option to begin employment with any new H-2A petitioner as soon as the H-2A petition is received by USCIS will also benefit U.S. agricultural employers and provide stability to the U.S. food supply chain during the unique challenges the country faces because of COVID-19.

In addition, the Department has determined that it is necessary to create a temporary exception to its regulations at 8 CFR 214.2(h)(5)(viii)(C), (h)(13)(i)(B), and (h)(15)(ii)(C) to allow aliens to extend their H-2A period of stay beyond the 3-year limitation, without first requiring them to remain outside of the United States for an uninterrupted period of 3 months.

Given these extraordinary times and possible delays of H-2A visa issuance at the U.S. Embassies and Consulates, the Department has determined to temporarily amend its regulations affecting H-2A workers in order to meet the needs of U.S. employers in the food and agricultural

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<sup>9</sup> See <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited on Mar. 30, 2020).

industries, who have already conducted a test of the U.S. labor market but have not been able to find qualified, available U.S. workers to fill the positions, during the National Emergency. This final rule proposes no changes to DOL's regulations or to the TLC process, which the employer must undergo to recruit U.S. workers prior to the filing of an H-2A petition with USCIS. The flexibility for H-2A workers to quickly move to a new employer will help meet the urgent need to minimize any negative impact to the U.S. food supply chain due to COVID-19. This extraordinary treatment is limited to aliens who are and have been complying with the terms of their H-2A status.

To be approved under this final rule, an H-2A petition for an extension of stay with a new employer must have been received on or after March 1, 2020 and remain pending as of the effective date of this rule, or received on or after the effective date of this rule and no later than the last day that this final rule is in effect (i.e., [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]). If the new petition is approved, the H-2A worker's extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the TLC. In addition, the temporary provisions differ from the existing provisions in that they grant employment authorization for 45 days from the date of the receipt notice. The 45-day employment authorization associated with the filed petition will automatically terminate 15 days after the date of denial or withdrawal if USCIS denies the petition, or if the petition is withdrawn.

To provide greater certainty to the market for the duration of the summer growing season, the changes made by this final rule will automatically terminate on [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. DHS will issue a new temporary final rule to extend the termination date in 8 CFR 214.2(h)(21)(iii) in the event DHS

determines that economic circumstances related to our food supply and U.S. agriculture demonstrate a continued need for these temporary changes to the regulatory requirements involving H-2A agricultural employers and workers. USCIS will continue to adjudicate H-2A petitions received no later than [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] under the provisions of this rule. If DHS extends the termination date, DHS will continue to adjudicate H-2A petitions received no later than the new termination date. Any H-2A petition received after the termination of this final rule, or any subsequently established termination date, will be adjudicated in accordance with the existing provisions. *See* 8 CFR 214.2(h)(2)(i)(D) and 274a.12(b)(21).

### **III. Statutory and Regulatory Requirements**

#### **A. Administrative Procedure Act**

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to sections 553(b) and (d) of the Administrative Procedure Act (APA). 5 U.S.C. 551 *et seq.*

##### **1. Good Cause to Forgo Notice and Comment Rulemaking**

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” The good-cause exception for forgoing notice-and-comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is “narrowly construed and only reluctantly

countenanced,” *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Department has appropriately invoked the exception in this case, for the reasons set forth below. As also discussed earlier in this preamble, on January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID-19.<sup>10</sup> On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak, dated back to March 1, 2020, to control the spread of the virus in the United States.<sup>11</sup> In response to the Mexican government’s call to increase social distancing in that country, DOS announced the temporary suspension of routine immigrant and nonimmigrant visa services processed at the U.S. Embassy in Mexico City and all U.S. consulates in Mexico beginning on March 18, 2020.<sup>12</sup> DOS expanded the temporary suspension of routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020.<sup>13</sup>

DOS designated H-2A visas as mission critical, and announced that U.S. Embassies and Consulates will continue to process H-2 cases to the extent possible and implemented a change in its procedures, to include interview waivers.<sup>14</sup> In addition, DHS identified occupations in food and agriculture as critical to the U.S. public health and safety and economy.<sup>15</sup> Due to travel restrictions, visa processing limitations as a result of actions taken to mitigate the spread of COVID-19, as well as the possibility that some H-2A workers may become unavailable due to illness related to the spread of COVID-19, U.S. employers who have approved temporary agricultural labor certifications and either approved H-2A petitions or who will be filing H-2A

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<sup>10</sup> *Determination of Public Health Emergency*.

<sup>11</sup> Proclamation 9994.

<sup>12</sup> *Status of U.S. Consular Operations in Mexico in Light of COVID-19*.

<sup>13</sup> *Suspension of Routine Visa Services*.

<sup>14</sup> *Important Announcement on H2 Visas*.

<sup>15</sup> *DHS Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*.

petitions might not receive, or be able to continuously employ, all of the workers requested to fill all of their DHS-approved temporary or seasonal agricultural positions. Due to these anticipated labor shortages, these employers may experience adverse economic impacts to their agricultural operations. Finally, fears over COVID-19 have prompted concerns about food shortages and food insecurity globally.<sup>16</sup> To partially address these concerns, DHS is acting expeditiously to put in place rules that will facilitate the continued employment of H-2A workers already present in the United States. This action will help U.S. employers fill critically necessary agricultural job openings, protect economic investments in their agricultural operations, and contribute to U.S. food security.

Courts have found “good cause” under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good-cause exception to address “a serious threat to the financial stability of [a government] benefit program,” *Nat’l Fed’n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid “economic harm and disruption” to a given industry, which would likely result in higher consumer prices, *Am. Fed’n of Gov’t Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Consistent with the above authorities, the Department has bypassed notice and comment to facilitate the employment of H-2A workers already in the United States, and prevent potential economic harms to H-2A agricultural employers and downstream employers engaged in the processing of agricultural products, as well as potential harms to the American economy and people that could result from ongoing uncertainty over the availability of H-2A agricultural workers, and potential associated negative impacts on food

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<sup>16</sup> See, e.g. *Coronavirus measures could cause global food shortage, UN warns*. <https://www.theguardian.com/global-development/2020/mar/26/coronavirus-measures-could-cause-global-food-shortage-un-warns> (last visited on Mar. 27, 2020).



security in the United States. *See Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). This action is temporary in nature, and includes appropriate conditions to ensure that it is narrowly tailored to the National Emergency caused by COVID-19.

## 2. Good Cause to Proceed with an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good-cause exception to the 30-day effective date requirement is easier to meet than the good-cause exception for forgoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed’n of Gov’t Emps., AFL–CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above, we also conclude that the Department has good cause to dispense with the 30-day effective date requirement given that this rule is necessary to prevent serious economic harms to U.S. employers in the agricultural industry caused by unavailability of workers due to COVID-19, and to ensure food stability for the American people.

## **B. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)**

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and

safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is designated a significant regulatory action under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. DHS, however, is proceeding under the emergency provision of Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously during the current public health emergency to secure labor for our food supply.

This rule will help U.S. employers fill critically necessary agricultural job openings, protect their economic investments in their agricultural operations, and contribute to U.S. food security. In addition, it will benefit H-2A workers already in the United States by making it easier for employers to hire them, and allowing them to remain employed, if applicable, longer than the 3-year limitation on their stay. As this rule helps fill critical labor needs for agricultural employers, DHS believes this rule will help ensure a continual food supply chain in the United States.

### **C. Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. *See* 5 U.S.C. 603(a), 604(a). This final rule is exempt from notice and comment requirements for the reasons stated above in Part III.A. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this final rule. Accordingly, the Department is not required to either certify that the final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

### **D. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 2 U.S.C. 1501, et seq. (UMRA), is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532. This rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

#### **E. Executive Order 13132 (Federalism)**

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, 64 FR 43255, 43258 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 12988 (Civil Justice Reform)**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988, 61 FR 4729 (Feb. 5, 1996).

#### **G. Congressional Review Act**

The Office of Information and Regulatory Affairs, of the Office of Management and Budget, has determined that this final rule is not a “major rule” as defined by the Congressional

Review Act, 5 U.S.C. 804(2), and thus is not subject to a 60-day delay in the rule becoming effective. DHS will send this temporary final rule to Congress and to the Comptroller General under the Congressional Review Act, 5 U.S.C. 801 et seq.

#### **H. National Environmental Policy Act**

DHS analyzes actions to determine whether the National Environmental Policy Act, Pub. L. 91–190, 42 U.S.C. 4231, et seq. (NEPA), applies to them and, if so, what degree of analysis is required. DHS Directive 023-01 Rev. 01 (Directive) and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500–1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c). This rule temporarily amends regulations governing the H-2A nonimmigrant visa program to facilitate the continued employment of H-2A nonimmigrants in the United States by allowing them to change employers in the United States and begin working in the same visa classification for a period not

to exceed 45 days before the nonimmigrant visa petition is approved, due to the National Emergency caused by the COVID-19 global pandemic. It also establishes a temporary exception from the 3-year limit on the maximum period of stay for H-2A workers. This rule does not change the number of H-2A workers that may be employed by U.S. employers as there is not an established statutory limit. It also does not change rules for where H-2A nonimmigrants may be employed; only employers with approved temporary labor certifications for workers to perform temporary or seasonal agricultural work may be allowed to employ H-2A workers under these temporary provisions. Generally, DHS believes NEPA does not apply to a rule intended to make it easier for H-2A employers to hire workers who are already in the United States in addition to, or instead of, also hiring H-2A workers from abroad because any attempt to analyze its potential impacts would be largely speculative, if not completely so. DHS cannot reasonably estimate how many petitions will be filed under these temporary provisions, and therefore how many H-2A workers already in the United States will be employed by different employers, as opposed to how many petitions would have been filed for H-2A workers employed under normal circumstances. DHS has no reason to believe that the temporary amendments to H-2A regulations would change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that even if NEPA were to apply to this action, this rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for “promulgation of rules . . . that amend an existing regulation without changing its environmental effect.”

This rule maintains the current human environment by helping to prevent irreparable harm to certain U.S. businesses and to prevent significant adverse effects on the human environment that would likely result from loss of jobs or income, or disruption of the nation’s

food supply chain. This rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

## **I. Signature**

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the Federal Register.

## **List of Subjects and Regulatory Amendments**

### List of Subjects

#### **8 CFR Part 214**

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

#### **8 CFR Part 274a**

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

## **PART 214 -- NONIMMIGRANT CLASSES**

1. The authority citation for part 214 continues to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

2. Amend § 214.2 by adding paragraph (h)(21) to read as follows:

**§214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(h) \* \* \*

(21) *Change of employers during COVID-19 National Emergency.* (i) If an H-2A nonimmigrant who is physically present in the United States seeks to change employers during the COVID-19 National Emergency (which began on March 1, 2020), the prospective new H-2A employer may file an H-2A petition on Form I-129, accompanied by a valid temporary agricultural labor certification, requesting an extension of the alien's stay in the United States. To be approved under this paragraph (h)(21), an H-2A petition must be received no later than [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the temporary agricultural labor certification. Notwithstanding paragraph (h)(2)(i)(D) of this section and 8 CFR 274a.12(b)(21), an alien in valid H-2A nonimmigrant status on March 1, 2020, or lawfully obtaining such status thereafter pursuant to this paragraph (h)(21), is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(21) is

received by USCIS, but no earlier than the start date of employment, indicated in the H-2A petition. The H-2A worker is authorized to commence employment with the petitioner before the petition is approved and subject to the requirements of 8 CFR 274a.12(b)(26) for a period of up to 45 days beginning on the Received Date on Form I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, 45 days beginning on the start date of employment indicated in the H-2A petition. If USCIS adjudicates the petition prior to the expiration of this 45-day period and denies the petition for extension of stay, or if the petition is withdrawn by the petitioner before the expiration of the 45-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(26) will automatically terminate 15 days after the date of the denial decision or the date on which the petition is withdrawn.

(ii) Notwithstanding paragraphs (h)(5)(viii)(C), (h)(13)(i)(B), and (h)(15)(ii)(C) of this section, an H-2A petition seeking an extension of stay, submitted with a valid temporary agricultural labor certification, may be approved on the basis of paragraph (h)(21)(i) of this section, even if any of the aliens requested in the H-2A petition have exhausted the otherwise applicable 3-year maximum period of stay in the United States and have not thereafter been absent from the United States for an uninterrupted period of 3 months, or if any such aliens would exceed the 3-year limit as a consequence of the approval of the extension.

(iii) This paragraph (h)(21) will expire on [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

\* \* \* \* \*

## **PART 274a – CONTROL OF EMPLOYMENT OF ALIENS**

3. The authority citation for part 274a continues to read as follows:



**Authority:** 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599.

4. Amend § 274a.12 by adding paragraph (b)(26) to read as follows:

**§274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(b) \* \* \*

(26)(i) Pursuant to 8 CFR 214.2(h)(21) and notwithstanding 8 CFR 214.2(h)(2)(i)(D) and paragraph (b)(21) of this section, an alien is authorized to be employed, but no earlier than the start date of employment indicated in the H-2A petition, by a new employer that has filed an H-2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 45 days beginning from the “Received Date” on Form I-797 (Notice of Action) acknowledging receipt of the petition requesting an extension of stay, or 45 days beginning on the start date of employment if the start date of employment indicated in the H-2A petition occurs after the filing. The length of the period (up to 45 days) is to be determined by USCIS in its discretion. However, if USCIS adjudicates the petition prior to the expiration of this 45-day period and denies the petition for extension of stay, or if the petitioner withdraws the petition before the expiration of the 45-day period, the employment authorization under this paragraph (b)(26) will automatically terminate upon 15 days after the date of the denial decision or the date on which the petition is withdrawn.

(ii) This paragraph (b)(26) is in effect for the period set forth in 8 CFR 214.2(h)(21)(iii).

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**Chad R. Mizelle,**  
Senior Official Performing the Duties of the  
General Counsel,  
U.S. Department of Homeland Security.

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